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REPORT OF THE MEETING HELD ON 23-24 JULY 1998

Note by the Secretariat

1. The Committee on Trade and Environment (CTE) met on 23-24 July 1998 under the chairmanship of Ambassador C.M. See of Singapore. The agenda in WTO/AIR/839 was adopted.

2. It was agreed that the Chairman would hold open-ended informal consultations to prepare the 1998 report of the CTE for adoption at the 26-28 October meeting.

Linkages between the multilateral environment and trade agendas

MEA Information Session

3. The observer of UNEP made a statement on the core environment principles and approaches underlying the development of multilateral environmental agreements (MEAs) and the relationship between MEAs and the WTO, which was circulated as WT/CTE/W/94.

4. In order to deepen the CTE's understanding of the linkages between the multilateral environment and trade agendas, the Secretariats of several MEAs were invited to participate.

5. Representatives of the following Secretariats made presentations and prepared background papers to contribute to the discussion: the UN Framework Convention on Climate Change (WT/CTE/W/74); UNEP Chemicals on the Convention on the Prior Informed Consent (PIC) Procedure for Certain Hazardous Chemicals and Pesticides in International Trade and the negotiations for a global treaty on Persistent Organic Pollutants (POPs) (WT/CTE/W/91); the UN Economic Commission for Europe on the ECE POPs Protocol (WT/CTE/W/88); the Basel Convention on the Transboundary Movement of Hazardous Wastes and Their Disposal (WT/CTE/W/90); the Convention on Biological Diversity (WT/CTE/W/92); the International Tropical Timber Organization (WT/CTE/W/89); the Intergovernmental Forum on Forests (WT/CTE/W/84); and the International Commission on the Conservation of Atlantic Tunas (WT/CTE/W/87).

6. Members welcomed the contributions from UNEP and the MEA Secretariats and commented on the trade-related aspects of the agreements set out in their background papers and presentations.

Items 1& 5: The relationship between the provisions of the multilateral trading system and trade measures for environmental purposes, including those pursuant to multilateral environmental agreements; and The relationship between the dispute settlement mechanisms in the multilateral trading system and those found in MEAs

7. The representative of Canada thanked UNEP for its statement at the MEA Information Session, which was helpful to CTE work in terms of informing trade negotiators of the common elements to MEAs. The MEA Secretariat papers had also contributed to an understanding of how core environmental principles and approaches had been applied to address particular environmental

concerns, and reinforced the need for domestic policy coordination in trade and environmental negotiations. Canada's views on Item 1 were based on the general framework outlined in June 1996 advocating that the WTO develop a "principles and criteria" approach to MEAs to guide international negotiators contemplating the use of trade measures in an MEA. Canada had proposed the following qualifying principles for MEAs: (i) the MEA was open to all countries; (ii) the MEA reflected broad-based international support; (iii) the provisions specifically authorizing trade measures should be drafted as precisely as possible; (iv) trade with non-parties to the MEA was permitted on the same basis as Parties when non-parties provide environmental protection equivalent to that required by the MEA; and (v) negotiators had explicitly considered the criteria developed by the WTO for the use of MEA measures. Canada had also suggested that MEA negotiators use the following criteria in determining the need for trade provisions: (i) trade measures were chosen only when effective and when other alternative measures were considered to be ineffective in achieving the environmental objective, or had proven to be ineffective without accompanying trade measures; (ii) trade measures should not be more trade-restrictive than necessary to achieve the environmental objective concerned; and (iii) the trade measures chosen should not constitute arbitrary or unjustifiable discrimination.

8. Since developing these principles and guidelines in 1996, Canada had used them domestically in developing its negotiating positions for new MEAs. They had helped Canada to structure its interdepartmental debates and to develop a fairly consistent policy on the use of such trade measures, bearing in mind that every MEA or regional environmental agreement had a different negotiating dynamic. As Canada continued to gain experience in their application, it should be better able to gauge the extent to which these principles and criteria helped to avert potential conflicts between MEAs and WTO rules. In considering the question of "accommodating" MEA trade measures within the WTO, the CTE should bear in mind the basic principle of good faith in international law; namely, that a State should not ordinarily enter into an international agreement that was clearly inconsistent with its existing obligations. In Canada's experience, implementing good faith was largely a matter of domestic policy coordination between ministries or agencies involved. By sitting down together as officials, commenting on drafts, and consulting with interested stakeholders, policy coordination can largely avoid potential conflicts or inconsistencies. The MEA Information Session had reinforced the need for trade officials to be involved in MEA negotiations just as the CTE, and other WTO bodies, benefitted from the involvement of environment officials. CTE work had made a significant contribution to improved coordination at the national level.

9. Post-Singapore, the CTE had reflected further on the actual means that a formal accommodation of MEA trade measures would take, integrating a principles and criteria approach. The range of proposals presented, and summarized in a matrix, had been helpful in these reflections. The practical issue of how to accommodate MEA trade measures without passing judgement, through application of some principles and criteria, arose in all possible scenarios. This “passing judgement” aspect was not acceptable from an environmental policy perspective, given the implicit hierarchy of international legal systems. From a trade policy perspective, it was clear that WTO Members were unlikely to renounce formally their WTO rights in the context of any such obligation without some form of “passing judgement”. The spectrum of options ranged from the waiver, or explicit passing of judgement by the WTO on MEAs, to a criteria-free formal amendment or understanding of Article XX, which amounted to formal renouncing of WTO rights. Any negotiation with respect to Article XX ran the risk of a result more restrictive than the *status quo*, which provided, as expressed in the 1996 Report of the CTE, considerable flexibility. This *status quo* continued to evolve through WTO panels. Concern from a trade law perspective was not that trade law will somehow be undermined by MEAs, rather, that protectionist interests will use otherwise legitimate instruments under MEAs to thwart trade, thereby bringing both trade law and MEAs into disrepute; in the case of the WTO for challenging ostensibly environmental measures, and for MEAs by being so abused.

10. Canada's felt that it was highly unlikely that the CTE, or the WTO itself, would be able to agree to any formal accommodation in the medium-term. It was not simply a question of political

will, but rather the difficulty in reaching a balanced and credible result acceptable to all. Canada asked whether a more practical "soft" approach should be taken in the development of a statement on the interaction between MEAs and the WTO. Such an interim solution should allow the CTE to deliver a strong policy message in a relatively less time-intensive and polarized negotiating process. Such a statement would build on the language in the 1996 Report of the CTE, recent developments in WTO jurisprudence, and improved awareness and understanding of the linkages between trade and environment negotiations engendered by the CTE's education and analysis phase post-Singapore. MEA Information Sessions and UNEP's statement had been particularly helpful in this regard. Such an approach would not necessarily preclude work on a more formal approach at a later stage, but would allow earlier and more balanced results within a credible timeframe.

11. Rather than the time-consuming and divisive search for a formal accommodation of MEAs, Canada asked whether the CTE would be better advised to devote more attention, either in the CTE or the TBT Committee, to the standards, labelling and other concerns that Members had identified at the 1998 Ministerial Conference as being their immediate trade and environment concerns. Clearly, a real but uncomfortable issue was non-product related process and production methods (PPMs), as recognized, either explicitly or implicitly, in the statements at the Ministerial Conference. As Canada had noted in the TBT Committee meeting of 1 July in the discussion of labelling of genetically modified organisms (GMOs), there was a need to address the policy challenge of labels concerning how products were produced and not just their final characteristics. Canadian traders increasingly took a pragmatic approach to addressing these challenges. Examples of this include the International Trade Centre's *Eco-labelling and other environmental quality requirements in textiles and clothing*, Colombia with respect to cut flowers, Brazil with respect to leather, and both Brazil and Canada with respect to forest products. These concrete examples reflected a pragmatic and constructive balance between trade and environment objectives. He asked whether the WTO could afford to ignore the market realities that modern technology and consumer preferences had created.

12. While Item 5 was largely subsumed by Item 1, it was helpful to note some aspects separately. The CTE needed to appreciate the different role that dispute settlement played in MEAs as opposed to the WTO, a theme that had emerged from the MEA presentations. While the dispute settlement provisions in trade agreements had been used on numerous occasions, there were no instances where similar MEA provisions had been used mainly because the WTO-type dispute settlement did not offer the most appropriate approach to ensure MEA implementation. Countries negotiating an MEA did not seek to gain improved access to another's environment in exchange for access to their own environment, but rather sought to address a common environmental problem through collective action. The impact of an MEA Party's failure to live up to its MEA obligations was often diffused across all Parties and hard to quantify and undermined the achievement of the common environmental goal and the collective action agreed upon to achieve it. As such, it would appear that MEA Parties placed greater emphasis on the development of strong and effective compliance regimes than on traditional dispute settlement. Compliance regimes tended to be based on peer review mechanisms that were non-adversarial and in which Parties worked cooperatively to seek solutions. In contrast, dispute settlement mechanisms were generally adversarial, Party to Party actions, that concentrated on the enforcement of obligations through third party arbitration.

13. MEA negotiators were coming to recognize that the objective of environmental protection was better achieved through the cooperative and facilitative approaches of compliance regimes. In contrast to WTO dispute settlement procedures, compliance regimes were intended primarily to facilitate full and timely compliance rather than to adjudicate or apportion blame, and were aimed at assisting Parties to identify and remedy non-compliance. This facilitative approach encouraged countries to enter into these agreements in that they may receive assistance to meet their obligations. MEAs, like the Montreal Protocol, the Basel Convention and the Climate Change Convention, placed greater emphasis on the development of strong and effective non-compliance rather than dispute settlement regimes in order to reinforce the integrity of their core legal obligations. The cooperative

and preventative nature of non-compliance mechanisms was more attuned to the nature of MEA goals and obligations than approaches centred on claims for reparation, sanctions and reprisal. In some cases, environmental damage caused by human activity may be irreversible and, in other cases, restoring the environment to an acceptable, if not its original state may be difficult to achieve. It was also difficult to agree on how to assess monetary environmental damage and to establish causal links between human activity and its transboundary effects.

14. Canada supported the development of strong and effective compliance regimes in MEAs and believed several elements needed to be considered in developing such regimes, including identifying potential non-compliance, determining non-compliance and its consequences, monitoring and determining return to compliance and an automatic review procedure for future non-compliance. The objective of any compliance regime should be to correct non-compliance in a cooperative and facilitative manner. The nature of a compliance procedure needed to be tailored to the achievement of the particular environmental objective of each MEA. Its operations should contribute to international consensus, and should provide an incentive to Parties to make use of it. The structure and scope of compliance procedures should, therefore, not seek to reintroduce dispute settlement under a different name, but to provide an effective tool for dispute avoidance and the resolution of questions pertaining to the performance of an individual Party under the MEA. It would be helpful if MEA Secretariats with functioning non-compliance procedures could keep the CTE informed on their development and operation, including measures taken to assist developing countries and economies in transition to comply with their obligations. In Canada's view, better MEA compliance mechanisms were more appropriate than dispute settlement, *per se*, and would reduce the potential risk for disputes either within MEAs or the undesirable bringing of MEA-related disputes to the WTO.

15. The representative of the European Communities said information provided by the MEA Secretariats showed the trend toward the development of a more harmonious relationship between MEAs and the WTO Agreements. This was illustrated, for example, by the successful negotiation of the PIC Convention. Recent developments under the Basel Convention were also encouraging, notably the adoption of Annexes VIII and IX at its fourth Conference of the Parties. Similarly, it was interesting to note that the Kyoto Protocol provisions laid the basis for exploring synergies between trade liberalization and environmental protection in the field of climate change. In fact, the removal of trade distortions which were counter to the Climate Change Convention's objectives was among the implementing policies and measures to be adopted by Annex I countries. After having heard the MEA presentations, it was relevant to ask why the MEA issue had been so divisive. Although the general atmosphere in the CTE had improved, it was also clear that there had been a certain geographical divide in the deliberations prior to Singapore. This divide might still be having an impact on the CTE's work on MEAs. There was a sense that positions in the CTE were determined by the perception that MEA trade provisions were detrimental to developing countries. In fact, several trade-related MEAs, including the Basel Convention, the PIC Convention and the Biosafety Protocol were aimed at responding to the legitimate concerns of developing countries.

16. The EC felt Item 1 should remain a priority for the CTE. There were expectations that the CTE had to meet as the WTO's credibility was at stake. He said that the CTE's inability to respond to UNEP's questions at the MEA Information Session was collectively embarrassing. The EC's position on MEAs was well-known. It was essential to devise effective mechanisms to develop a more harmonious relationship between MEAs and WTO Agreements. It would be important to accommodate some trade measures adopted by MEA Parties; this would not, in itself, be a major revolution, since WTO rules already provided considerable scope for accommodating the use of trade measures necessary for environmental purposes. This was confirmed by the interpretation given to Article XX in dispute settlement practice. At the March 1998 meeting, the EC had commented on WT/CTE/W/53 concerning Article XX case law. It would be necessary to address this matter again. It would be useful to consider whether the Appellate Body confirmed the criteria developed in previous case law in the case currently pending before it. Item 1 was broader than the MEA issue.

For this reason, it might also be useful to enlarge the scope of the analysis to consider case law on other WTO provisions, for example, some of the Appellate Body's findings on Hormones might be relevant to CTE work. Elements, such as the precautionary principle, could be further explored. Continuation of an informal dialogue with MEA Secretariats was important not only in order to have an overview of developments in international fora, but as a confidence building exercise.

17. The representative of Australia welcomed the participation of MEA Secretariats in the Information Session; such sessions had a valuable role to play in improving policy coordination on trade and environment. It was important to build on this information exchange to enhance coordination on issues relevant to both WTO and MEAs. Knowledge from experience gained was an invaluable input to the future development of MEAs. The MEA Information Session had highlighted some key factors, including the diversity of aspects relevant to MEA policymaking, such as environmental problems, conditions and objectives, and scientific and technical aspects for assessment and monitoring; economic conditions, including trade, technological/production factors; and the perspectives/priorities of the countries involved and their political, institutional/legal environments. This pointed to the importance of the participation in MEA formulation of officials from different spheres and coordination of all these factors at the national level. This diversity invited a diversity of response, as illustrated by the variety of approaches in different MEAs. Flexibility in MEAs was important to allow for this diversity, especially over time, i.e. through changes in countries' abilities to deal with problems; or for consideration of restrictions on materials. A holistic approach should be taken, whereby MEA trade measures were viewed not in an isolated way, but as one element which may be appropriate in some circumstances. Transparency was another important aspect of MEA policymaking. The listing procedure in the Basel Convention had clarified the extent to which chemicals were covered, reducing uncertainties about possible future trade in recyclables.

18. Information facilitation had an important role in MEAs, and was at the centre of the PIC Convention and the Biosafety Protocol; it could assist countries to assess environmental risks associated with trade in a way which focused resources on areas of real concern, whilst other areas of activity were not caught up needlessly. This may have an overall trade facilitating effect. There were two levels for addressing MEA trade measures: the overall interaction with trade; and the design of specific trade measures within MEAs. As the majority of MEAs did not incorporate trade measures, it was likely that the former was more significant for trade. Australia asked the Secretariat to follow-up on any quantitative estimates of the impact of MEA provisions on trade flows, whether from an overall perspective, or in relation to specific trade measures. As the Biosafety Protocol was an example of an MEA which could have significant trade impacts, the key issue would be to ensure that importing Parties had sufficient information to focus their limited resources on areas of the greatest environmental risk, while not providing additional trade barriers (or pretexts for trade restrictions), nor discouraging safe biotechnology research and development. If the Protocol achieved this, it would facilitate mutually supportive trade and environment policies. Failure to do so may have costly ramifications, including installed trade, which alone could outweigh the impact of a specific trade measure taken in an MEA. As Australia had said at the MEA Information Session, it was crucial to fully involve trade officials in these negotiations.

19. Australia recognized that WTO rules provided countries with the ability to protect their environments. WTO rules did not appear to have prevented the formulation and implementation of appropriate multilateral measures to promote environmental protection, including where they encompassed trade measures, as had been demonstrated by the absence of any challenge to MEA trade measures. It could also be argued that WTO disciplines, particularly Article XX, promoted the design of MEA trade measures in favour of clarity and transparency, simplicity, and appropriateness to the relevant factors, including economic and trade aspects.

20. The representative of Japan thanked Canada for its statement, which her delegation would examine. Discussions on Items 1 and 5 had revealed that addressing the relationship between MEA

trade measures and the WTO was a difficult issue. The CTE should continue its effort to tackle this interface to ensure multilateral approaches to address global environmental problems, while avoiding the use of unilateral trade measures. It would also facilitate mutual supportiveness of trade and environment. UNEP's presentation at the MEA Information Session, particularly the questions posed, provided elements of a way to approach this issue. The CTE should respond to UNEP's questions, specifically to clarify what it viewed as MEA trade measures which were WTO-compatible.

21. Developing a set of criteria for MEA trade measures was one possible solution. Such criteria could include: (i) that the MEA had the clear objective of environmental protection; (ii) that the MEA had a universal nature in light of its objective, including parties with relevant, significant trade and economic interests; (iii) that the MEA trade measures had been negotiated reflecting knowledge of environmental experts as necessary measures for achieving its objective; and (iv) that MEA Parties had agreed to introduce MEA trade measures. Japan's proposal on guidelines for MEAs (WT/CTE/W/31) was based on this idea and could be further developed by introducing the differentiated approach. Japan was aware that discussion of such criteria tended to provoke diverse opinions and that unduly stringent criteria might have a chilling effect on MEA negotiations. Given that this may continue to be the case as long as the discussions remained abstract, discussion should focus on concrete examples. There had not been a WTO dispute concerning existing MEA trade measures. This fact provided the opportunity to analyse specific MEA trade measures, such as in CITES, the Basel Convention, and the Montreal Protocol, to draw out a model of WTO-compatible trade measures. This process did not mean to judge individual trade measures in specific MEAs in the CTE. However, individual MEA measures could be used as a reference point. It would be useful to study a framework to provide predictability for MEA trade measures in terms of their WTO-compatibility. The OECD and UNEP reports which analysed trade measures in CITES, the Basel Convention and the Montreal Protocol could be useful for the analysis.

22. The representative of New Zealand said her delegation's aim was to identify ways in which the CTE could nurture the complementarities between trade and environmental objectives. In 1998, progress had been made under the market access cluster, by identifying the extent to which trade liberalization and removing trade distorting policies contributed to a better environment. The CTE needed to look at the issues in terms of these complementarities, which should be addressed at every level at which trade and environmental policies were formulated within states and in multilateral fora. To work towards a complementary relationship, Members should ensure a better understanding of the issues underlying CTE discussions and effective coordination between trade and environment officials in MEAs. In New Zealand, close consultation existed between government departments, agencies, and stakeholders on trade and environment issues through regular intra and interdepartmental and agency discussions, NGO briefings, and regular public information dissemination. At the international level, much could be done to strengthen the complementarities between MEA-mandated actions and WTO rules. Ensuring that MEAs contained effective mechanisms for dealing with disputes was important to avoid the burden of resolving disputes concerning MEA-mandated measures falling by default to the WTO. This aspect should be given appropriate priority in MEA negotiations. Regular MEA Information Sessions in the CTE played an important role in this regard. New Zealand would consider additional proposals to enhance information exchange between the WTO and MEAs. It might be useful to consider a thematic approach to MEA Information Sessions, focusing on specific issues, such as compliance or dispute settlement. MEA Information Sessions were not a substitute, but a complement to effective national coordination. As most WTO Members were also Parties to key MEAs, a coherent approach should be taken by national officials in both fora.

23. In addition to these immediate, practical steps, reflection should continue on the framework that underpinned the relationship between the WTO and MEAs. Since the CTE had been established, and in the lead up to the 1996 Singapore Ministerial, this issue had been extensively discussed; the 1996 Report of the CTE set out the wide range of views and papers on ways to address this issue. New Zealand's paper (WT/CTE/W/20) argued for a differentiated approach based on the specificity of

the measure involved, and whether it was applied between Parties and non-parties. New Zealand's paper proposed an understanding to clarify the application of WTO provisions to MEA trade measures. It was widely accepted that there was considerable scope for countries to use trade measures for environmental purposes in a WTO-consistent manner. In the longer term, an understanding, as suggested by New Zealand, would assist both environment and trade negotiators to ensure their respective systems were compatible, and encourage greater cooperation. Reflecting the objective of making trade and environment policies mutually supportive, it would also be consistent with the view that multilateral cooperation was more effective than unilateral action when pursuing global environmental objectives, as recognized in Principle 12 of the *Rio Declaration*.

24. In clarifying the relationship between MEAs and WTO rules, a balance must be achieved between the obligations entered into by WTO Members and the global issue of environmental protection. In developing its proposal, New Zealand wanted to allow the use of trade measures in defined circumstances to advance environmental objectives where these were necessary, whilst ensuring that such measures were not used for protectionist purposes. Any MEA trade measures should be able to achieve international support and be considered the most effective way of achieving the end goal. There would also be clear benefits in making environmental measures subject to vigorous scientific justification as, for example, was required for SPS measures. In 1996 and to-date, there had been no agreement on what represented an acceptable approach to this issue. While it was not useful to return to a detailed discussion of specific proposals, evolving CTE work should reflect on the common principles and considerations which underpinned several approaches, even if the specific details of each proposal varied. Evolving jurisprudence on GATT Article XX should also be considered. While it remained the case that there had not yet been a WTO dispute that specifically related to MEA measures, the possibility of such a case in future should not be discounted. There had been an increase in the references to trade measures in existing MEAs and in those treaties still under negotiation, which underlined the need to ensure that work continue at the national and international level to development a better understanding and a more coordinated approach to avoid potential conflicts. New Zealand looked forward to exploring ways of progressing this issue.

25. The representative of Korea said, as set out in the 1996 Report of the CTE, multilateral solutions based on international cooperation were the most effective way for governments to tackle global transboundary environmental problems. The WTO Shrimp-Turtle Panel Report reinforced Korea's conviction that unilateral trade measures to address environmental problems enforced extrajurisdictionally should be avoided. To date, MEA trade measures had not caused any disputes among MEA Parties, nor presented any legal complications to the WTO. However, if MEA trade measures were not specifically mandated, they had the potential to clash with WTO rules. As such, Korea had proposed to analyse MEA trade measures in light of their specificity and whether they applied to Parties or non-parties. Since the Singapore Ministerial, the CTE had not devoted sufficient time to exploring the methodology through which to further discussions. The differentiated approach, proposed by New Zealand and Korea, could be used as the basis for mutually supportive interaction between trade and environment. Although, in certain cases, trade measures were recognized as effective to achieve MEA objectives, trade measures were not the only policy instruments they employed. A mixture of policies, such as technology transfer and capacity building, were indispensable to ensure successful MEA implementation. The Montreal Protocol owed much of its success to a combination of policy instruments, including addressing incremental costs through the Multilateral Fund. The Kyoto Protocol had introduced the concept of Joint Implementation and the Clean Development Mechanism as incentives to facilitate implementation. Effectiveness of the intended measures should be reviewed not only in the MEA, but in the WTO. Progress on Item 5 was related to Item 1, and could not be expected for now given the stalemate under Item 1. As indicated in the 1996 Report of the CTE (para 178), if a dispute arose between WTO Members, Parties to an MEA, over the use of trade measures they were applying between themselves pursuant to an MEA, they should consider trying to resolve it through MEA. Article 3 of the WTO Dispute Settlement Understanding could also be cited in this regard.

26. The representative of Switzerland said the MEA Information Session had revealed that the understanding of the links between environmental protection and WTO rules was improving, as illustrated, for example, by the negotiation of the PIC Convention. The format of MEA Information Sessions could be improved to enhance coordination and information exchange between the CTE and MEAs. The links between WTO rules and MEA trade measures remained a priority issue for Switzerland. Switzerland had always shown a particular interest in Item 1, as illustrated by the Swiss proposal (20 May 1996) and regular statements on this Item. Environmental protection was a daily concern for people and governments. In order to deal with environmental problems whose scope extended beyond national borders, states had concluded many MEAs. Some of these MEAs contained trade-related provisions which authorized or obliged Parties to adopt trade measures to achieve given environmental objectives. It was not up to a trade forum, such as the CTE, to criticize these provisions; they existed and had been widely adopted and ratified by a large part of the international community. The WTO should concentrate on avoiding that these trade measures, taken in conformity with an MEA, were applied for protectionist purposes.

27. Article XX permitted WTO Members to take measures to protect the environment once certain conditions, listed in its chapeau, were fulfilled. The question on which to focus was not on whether these MEA provisions were in conformity with WTO rules, but on how MEA Parties implemented these provisions. It was at this stage that the risk of misuse of environmental objectives pursued by MEAs became greater. The Appellate Body shared this opinion, as illustrated in the Gasoline Report: "The chapeau [of Article XX] by its express terms addresses, not so much the questioned measures or its specific contents as such, but rather the manner in which that measure is applied." The purpose and objective of the chapeau, according to the Appellate Body, was to prevent the abuse of Article XX exceptions. The more precise the obligations on MEA Parties, the lower the risk of MEA objectives being circumvented for other purposes. This was why Switzerland's proposal for a "coherence clause" was restricted to specific trade provisions taken pursuant to MEAs.

28. The MEA Information Sessions had revealed that, although no disputes had been submitted to the WTO dispute settlement mechanism with respect to the conformity of trade measures taken pursuant to MEAs, doubts remained in the mind of negotiators when they were considering if it were necessary to introduce provisions to authorize Parties to take trade measures to meet MEA objectives. These doubts should be addressed. Switzerland had proposed to complement the Agreements in Annex I of the WTO with a memorandum of understanding on trade measures taken pursuant to MEAs. Switzerland's proposal remained on the table and his delegation was prepared to discuss its details. To pursue work on this Item, it had been suggested to use a differentiated approach, through which different types of MEA trade provisions would be identified, a distinction would then be drawn between the circumstances under which these provisions were applied and, in each case, possible solutions would be sought. Although this approach had interesting theoretical aspects, due to its complexity, it would not help to solve the problem being examined under Item 1. Canada's suggestions offered an interesting short term solution. In the medium term, however, in keeping with the EC's statement, Switzerland felt it was necessary to develop a framework to define the status of trade measures taken pursuant to MEAs.

29. The representative of Turkey said the quantity of the work and variety of views indicated how sensitive and important this item was to CTE work. MEAs were among the best instruments to address global or transboundary environmental problems and there was complementarity, rather than conflict, between trade and environmental objectives. Due to the growing complexity of environmental problems and the evolving nature of MEAs, enhanced coordination between trade and environment communities at the national and international level, and between MEA Secretariats and the WTO was the best way forward. Turkey welcomed the MEA Information Sessions. As the universal character of an MEA grew through its scope and participation, it moved closer to the essence underlying the WTO. Therefore, another way to avoid potential conflicts and make MEAs and the WTO mutually supportive in resolving, international environmental problems was to improve

participation in MEAs. Trade measures in MEAs can be used, as a last resort, to address environmental problems; a balanced package of measures was necessary to achieve MEA objectives. Considering the incentives and financial means that sustainable trade provided for environmental protection, especially for developing countries, trade opportunities should be expanded.

30. As interpreted by WTO panels, Article XX provided limited and conditional exceptions from WTO obligations. MEA trade measures should be least trade restrictive, non-discriminatory and proportional; they should also meet the effectiveness and necessity criteria set out in Article XX. Unilateral action and extrajurisdictional use of trade measures should be avoided to minimize WTO inconsistency. However, not all MEA trade measures raised consistency issues, and when they did, their effects were not to the same extent. An analysis of the effects and effectiveness of trade measures used to achieve MEA objectives would be useful. As set out in WT/CTE/W/53, measures should be examined and interpreted under Article XX. The "specificity" concept needed to be further examined. Given that disputes encountered so far had resulted from unilateral actions, avoiding the use of trade measures which had not been multilaterally agreed would avoid potential disputes.

31. The representative of Norway said that the main task under this Item was to clarify how two sets of legal commitments (WTO rules and MEAs) were complementary so that conflicts were prevented. Problems related to MEA non-parties which were WTO Members. Between MEA Parties, an MEA had *lex specialis* and could be assumed to prevail over the WTO. At the September 1997 meeting, several Members had recognized that the CTE was faced primarily with two options: (i) rely on evolving jurisprudence (the *status quo*); or (ii) devise solutions to accommodate MEA trade measures in the WTO. During the years that the CTE had discussed Items 1&5, developments had taken place on the environmental side. MEAs, as a means to solve global/transboundary environmental problems, had increased in number and importance as illustrated in the two MEA Information Sessions which been held in the CTE. The development of MEAs as an effective way of solving global environmental problems would likely reduce the resort to unilateral and extrajurisdictional measures. To a certain extent, MEAs also applied the precautionary principle, for example in the Montreal Protocol. A number of WTO panels, including that on import prohibitions of certain shrimp and shrimp products (part VII, WT/DS58/R), attached importance to whether international cooperation had been sought before a trade restrictive measure was used. Negotiation of an MEA or action to solve a global or transboundary environmental problem was, in the view of that panel, a possible way to avoid threatening the trading system (para. 55). Norway reiterated its suggestion at the September 1997 meeting that some issues be examined more in depth than others in the search for a possible accommodation, such as, *inter alia*, the relationship between MEA Parties and non-parties, non-product related production and process methods (PPMs), specificity of trade measures, and participation and openness of MEAs. Factual, analytical papers, based on the minutes of CTE meetings, would facilitate discussion of such issues.

32. The representative of Argentina said there had been a positive dialogue at the MEA Information Session. UNEP's statement had raised several challenges. It was interesting that UNEP had noted that MEAs contained packages of measures to address environmental problems which were only effective when applied as a whole, for example in order to eliminate the production of, and trade in an environmentally damaging product. It was necessary for such a package of measures to promote access to technology, which made it possible to produce substitutes. During the CTE's analysis, Argentina had maintained that it was necessary to examine packages of measures contained in MEAs. The questions posed by UNEP were interesting; it would be difficult for the CTE to reply to all these questions, but it might attempt to respond to some. For example, UNEP had asked when trade measures were considered to be consistent with WTO rules. This question had been discussed in the CTE for the past few years without any response. Progress could be made by defining the measures which were clearly WTO-incompatible. Concerning the issue of environmental principles, particularly the precautionary principle, the Appellate Body Report on Hormones was relevant. Any decision linked to a problem between Members states led to obligations for that case

and those Parties. Nevertheless, the Appellate Body's finding that the precautionary principle was contained in Article 5.7 of the SPS Agreement, but that this principle may go beyond the provisions of that Article was of importance. This posed a challenge to avoid the use of the precautionary principle as a justification for protectionism. The application of the precautionary principle in accordance with the SPS Agreement ought to be provisional in order to obtain information to assess risk. As suggested by the EC, future discussion of this issue in the CTE would be useful.

33. The representative of the European Communities said the methodology of the differentiated approach, proposed by New Zealand and Korea, was useful. Proposals by others, such as the EC, were also based on differentiated situations in MEAs. The 1996 Report of the CTE was also based on the distinction between MEA Parties and non-parties, and the specificity of trade measures. The parameters suggested by this approach had been used in a general way throughout CTE work. Doubts, however, remained in terms of the substantive criteria which had been proposed for each of the situations identified on the basis of the differentiated approach.

34. The representative of Egypt said that although *Agenda 21* set out several positive measures to assist developing countries to meet the goals of sustainable development, not much concrete progress had been made in this regard. The WTO would have to address its relationship with MEAs. It might be difficult to address the range of positive measures in the WTO; however, promoting technology transfer and improving market access were within WTO competence and should be addressed.

35. The representative of the United States expressed his delegation's appreciation for the MEA presentations at the Information Session. If there was one frustration, it was that this session had tried to do too much in one day and it had not been possible to do justice to the quality of expertise available to the CTE. This was an aspect that should be considered in organizing future sessions with MEAs. He noted that new aspects had been raised at this meeting, for example by Canada. He highlighted the importance of coordination, an area in which progress remained to be made. Although participation from environmental agencies in the CTE was increasing, improvements could be made in this regard. Much more needed to be done on the MEA side of the equation. The PIC Convention negotiations had been successful in bringing trade expertise to bear on the process; trade experts had not been brought in as watchdogs, but called upon to help make that agreement as functional as possible. However, if one looked at other negotiations, this was the exception rather than the rule. For example, in the Biosafety negotiations, which had potentially enormous trade effects, there were only a few trade experts involved. The US referred to the EC's comment on the number of instances in which trade measures were sought by developing countries in MEAs, such as the PIC and Basel Conventions. A vocabulary gap remained between trade and environment officials, such as with the use of the term "positive measures". It was important to use terms which were meaningful to both trade and environment officials. When this term had first been used at UNCTAD, it was in a non-MEA context, in reference to the suggestion that, as governments were taking measures to improve their environment, positive measures could be used to help them achieve this objective. Unfortunately, this term had then been used in the context of MEAs.

36. Commenting on WT/CTE/W/84, he said that the Intergovernmental Forum on Forests (IFF) did not have a mandate to formulate trade agreements. The IFF was an *ad hoc*, time-limited body, whose purpose was to formulate recommendations on a range of forest issues, including trade issues, for consideration by the Commission on Sustainable Development. It was hoped that the IFF would address and clarify some issues related to trade and environment in the forest sector. These issues had been clearly identified in the IFF terms of reference and included trade measures left pending, such as tariff and non-tariff barriers in relation to sustainable forest management, certification issues where relevant and improved market access. The list in WT/CTE/W/84 gave the misleading impression that the other items listed in Section V were part of the IFF's trade agenda. While these may be important forest issues in other contexts, the IFF had not agreed to address them in relation to trade.

37. The representative of Brazil referred to the EC's comment on the perception among developing countries that MEA trade measures were detrimental to them; this was not Brazil's perspective. Trade measures had a role to play in environmental protection. However, they had different effects in developing countries. In this regard, she cited the ban amendment of the Basel Convention as an example. Whilst the ban on transboundary movements of hazardous wastes was useful in the context of some developing countries, it could be detrimental to others which had some technological capacity to manage waste. The fact that this specific measure was the result of a consensus-based multilateral process made it easier from the Brazilian perspective. Concerning Argentina's comments on UNEP's request to determine when measures in MEAs were WTO-consistent, she enquired as to whether a start to such a discussion could be made by stating that the answer would not be legal, but subjective. If the MEA measure were the outcome of a consensus-based multilateral effort, then it should be considered WTO-consistent as it was part of a specific context, and was probably contained in a package of measures necessary to address a specific case. She welcomed the dialogue with MEA Secretariats at the Information Session. The CTE had facilitated greater awareness in Brazil of the relationship between trade and environment. Brazil would circulate its statement at the MEA Information Session on the International Commission for the Conservation of Atlantic Tunas (WT/CTE/W/95).

38. The representative of India said the MEA Information Session had been informative. It was clear that MEAs developed a package of measures, which sometimes included trade measures, to achieve their objectives. India shared Turkey's view on the usefulness of these trade measures and agreed with Brazil that these measures could have different effects in developing countries. Several questions had been raised by the MEA presentations, for instance with respect to the Montreal Protocol. India welcomed the efforts made in the Montreal Protocol to make available technology under fair and most favourable terms, and looked forward to further work on Decisions IX/14 and IX/5. Whilst technical assistance on the closure of some ozone depleting substance (ODS) producing units in developing countries was available under the Montreal Protocol, slow progress on technology transfer was impeding environmental progress. India was interested in developments in the Kyoto Protocol. As greenhouse gas emissions were a global pollution problem, the reversal of this environmental problem was appropriately addressed through such an MEA. The reversal of local or regional environmental problems, however, were best addressed locally or regionally. As affirmed in the 1996 Report of the CTE, trade liberalization accompanied by appropriate domestic environmental policies was the ideal solution. On the use of the term "positive measures", India supported Egypt's suggestion to address technology transfer and market access issues in this context. On the relevant trade principles for the environment and *vice versa*, he recalled India's contribution under Item 2 (23 July 1996). The CTE had discussed these principles, including the precautionary principle. Following the Appellate Body Report on Hormones, the CTE should consider the precautionary principle, particularly to ensure it was not used for protectionist purposes.

39. The Chairman said that in order to enhance the dialogue at MEA Information Sessions, either more time could be devoted to these sessions, or the number of MEA participants could be reduced.

Item 7: The issue of the export of domestically prohibited goods

40. The representative of the European Communities said WT/CTE/W/73 contained an exhaustive treatment of the product coverage of international instruments which addressed domestically prohibited goods (DPGs), as well as possible formats for DPG notifications in the WTO. The EC was willing to endorse the idea put forward by many developing countries according to which the WTO could re-establish a DPG notification system. However, lack of a precise definition of DPGs would compromise such a notification procedure. The EC requested the Secretariat to contact the relevant international instruments in this respect. He noted that the format in Annex B of WT/CTE/W/73 could have wider repercussions on customs' practices.

41. The representative of Egypt said WT/CTE/W/73 was informative with respect to other fora's work on DPGs. Egypt supported the format for DPG notifications used from 1983 to 1990.

42. The representative of the United States said WT/CTE/W/73 illustrated the wealth of activity in various international organizations which had the relevant expertise to deal with DPGs. Any frustrations concerning the discussion of DPGs may stem from the fact that the WTO was not as well placed as other organizations to deal with this issue. For example, the PIC Convention negotiations had required considerable chemical expertise. While the CTE should consider the contribution it could make to other fora's work, their expertise went beyond that of the CTE in this area.

Item 8: The relevant provisions of the Agreement on Trade-Related Aspects of Intellectual Property Rights

43. The representative of the United States thanked India for providing its written comments in advance of the meeting and reserved the possibility to provide further written comments. On WT/CTE/W/82, he commented that while pointing to the role that patent protection played in encouraging the development of environmentally-friendly products, this paper called for a reduction in patent protection for such products. A reduction of patent protection would reduce the quality and quantity of products available. Without such protection, he enquired as to who would invest time and money in inventing and developing environmentally sound technologies (ESTs). Another way to view the issue was to ask whether increasing patent protection should be considered for such products to spur their development. India's paper asserted that patents restricted competition, causing restricted output and higher prices, which was not the case. One need only look at those countries that had strong patent protection or were strengthening protection to see that the variety of goods available was steadily increasing with, in most cases, decreases in prices. In economies where copying rather than innovation was the rule, as patent protection was weak or lacking, goods involving recent technological developments were fewer and more expensive. India's own experience with software, which was protected under India's copyright law, should indicate that protection of intellectual property rights (IPRs) had a positive effect on a country's domestic market and export income.

44. Paragraph 6 of WT/CTE/W/82 had not mentioned the factors most directly affecting technology transfer and trade (e.g., a country's foreign investment climate, import laws and regulations, marketing approval procedures, market conditions, transportation and distribution infrastructure, etc.), because these factors "could not have uniformly contributed toward" the non-availability of environmentally-friendly products. These factors need not operate "uniformly" in the countries to which India refered to be primary influences on technology transfer and trade in products. Any related "problems" could not be addressed without analysing the effect of each of these factors, all of which were under the control of the country complaining of the hypothetical problem. India had asked that other countries, without any evidence that a problem existed or any serious analysis of all of the factors that might account for the problem, agree to weaken their patent laws or otherwise take responsibility for problems that had not been shown to exist. Paragraph 7 asserted that problems may occur in MEA implementation because of a novel concept refered to as "virtual standards", where there were various substitute products available, but the market gravitated towards one of them. However, evidence had not been presented that such standards were more than hypothetical. MEA standards were negotiated and, during the negotiation, a country had an opportunity to point out if there were only one product that would meet a standard under consideration, allowing the negotiators to agree on a standard that could be satisfied by a variety of products or technologies.

45. On WT/CTE/W/85, the US commented that India's argument that Article 29 of the TRIPS Agreement must be amended so that India could implement its obligations under the Convention on Biological Diversity (CBD) was groundless. Nowhere in the CBD were Parties required to demand that patent applicants disclose the country of origin for biological source materials. The question of

prior informed consent, although a goal of the CBD, was unrelated to the patent process, particularly as research in this area was not always the subject of a patent application, and would not be relevant to the TRIPS Agreement. India proposed to design a *sui generis* intellectual property (IP) system for local, contemporary innovations, but had not made a case that this was necessary. Contemporary innovations, whether made by individuals with traditional lifestyles or university researchers, may be patentable if they were new, useful and contained an inventive step. India had not demonstrated what its concerns were with regard to this subject matter and why a *sui generis* IP regime was required to address non-patentable local practices. India suggested that the negotiation of the TRIPS Agreement had been concluded before the CBD, and, thus, the TRIPS Agreement needed to be reviewed in light of Article 16.5 of the CBD. India relied on the claim that the Uruguay Round ended in December 1991 as "very few changes were allowed" in the negotiated text after that date. The negotiations had not concluded until December 1993, and significant changes to the Dunkel text, including the TRIPS Agreement, had been made. Having concluded the CBD in June 1992, it was reasonable to assume that Members were aware of the CBD in forming their positions on the TRIPS Agreement.

46. The representative of Japan made a preliminary statement on this Item. Japan was studying the issues which had been raised under this Item, such as the dissemination of environmentally sound technology and products (EST&Ps) and TRIPS-related issues. The importance of technology transfer and capacity building had been noted in the 1996 Report of the CTE (paragraph 173). Japan was examining whether EST&Ps could be transferred on more concessional terms. One idea could be to analyse whether concrete problems existed in this respect. EST&P dissemination was important for environmental protection. Some Members considered that in order to promote technological innovation, IP protection was also important. The CTE's task was to seek a balanced solution.

47. The representative of the European Communities commented that IPRs and the respect of patent protection was controversial. Critics of patent protection had not taken into account that the immediate beneficiaries of such protection would be people themselves, as well as the environment, biodiversity and sustainable development. An efficient IP system provided incentives for research and development and, thus, for new EST generation; it attracted investment by providing protection for the results. It also promoted EST transfer as right holders were more willing to voluntarily transfer ESTs. Such a system helped local producers to safeguard investments, vis-à-vis usurpation by a third policy and, thus, helped develop the domestic economy and the resources for financing environmental protection. An efficient IP system did not call into question national laws to monitor the application of research or the use and commercialization of its results for environmental purposes, such as for CFCs; patents were granted, but in many countries laws prohibited their use.

48. Patent protection was not an obstacle to access to traditional knowledge for many reasons. Inventions, not discoveries, were patentable. Novelty and inventive steps were preconditions for patent protection. For example, in the case of a patent claim for a pesticide of neem leaves, this precondition would be destroyed in the case of indigenous production. However, it was correct that indigenous knowledge may be the foundation upon which a novel patentable product or process was developed, for example by local producers and, for some reasons, the existing patent system could not safeguard their interests. In this case, acknowledgement of, and compensation for the invention could be achieved on a contractual basis amongst interested parties, governments, research institutes, inventors, and indigenous communities outside the IP system to safeguard benefits. Benefit sharing comprised more than a decision about who should be the legitimate right holder. A contractual approach allowed for flexible solutions which took into account each case. One example was benefit sharing in the use of genetic material from the smokebush which involved agreements between the Australian government, the National Council Institute in the US, and Australian pharmaceutical and research consortia, covering issues such as royalties, research funding, research and technology acquisition, access and commercial development of a product derived from Australian flora, as well as marketing licenses. The condition for such a solution was a domestic structure in the country of

origin of the genetic resource. It would be useful if Members, along with the CBD, could contribute practical examples to illustrate the compatibility between TRIPS and biodiversity conservation.

49. The representative of Colombia felt that the relationship between the environment and the TRIPS Agreement was important. The CTE should analyse issues such as EST transfer; what happened when an MEA mandated the use of a product subject to patent protection; protection of living organisms; and protection of indigenous peoples' knowledge. The latter two issues should be seen in the context of the CBD, which set out that states have a sovereign right to exploit their resources through domestic environmental policies and the obligation not to engage in activities which cause harm to third parties. Concerning access to genetic resources, the Andean Group, including Colombia, had passed Decision 391 of the Cartegena Agreement, submitted to the CTE at a previous meeting. To ensure that activities within a country's jurisdiction did not cause harm to third parties, the TRIPS Agreement should help to guarantee that national legislation adopted in accordance with national environmental policies and based on MEAs was respected by third parties. The TRIPS Agreement had an important role to play in this respect. For inventions linked to living organisms, the TRIPS Agreement should require that patent applications indicate the origins of the samples and reference to whether living organisms had been extracted in accordance with the norms of the country of origin. If indigenous knowledge were involved, there should be a certificate of compliance with the existing standards in the country of origin. For example, if a patent were sought in a WTO Member for an invention connected to a living organism, or which involved traditional knowledge, compliance with domestic requirements should be indicated in the patent application for access to these resources in the country of origin. These requirements may refer, *inter alia*, to the need for prior informed consent through an access contract to exploit genetic resources. If the patentee had not complied with these provisions, then the patent should not be granted. It was up to the CBD and each country to define access to genetic resources and protection for indigenous knowledge in its territory. Such a process would guarantee, through the TRIPS Agreement, that these regulations would be respected by WTO Members.

50. The representative of Norway recalled his delegation's emphasis on the importance of ensuring consistency when developing and implementing MEAs, and on maintaining the flexibility provided for in the TRIPS Agreement on IPR legislation relating to living materials. IPRs were intended to encourage creativity and innovation, however, their extension to living materials, including plants and animals, was controversial. Difficult issues had been raised in this context. Living organisms were qualitatively different from products which had traditionally been given IPR protection. Ethical considerations were involved and possible links between IPRs and biodiversity loss as IPRs might encourage genetic uniformity had not been explored. Criteria for what constituted an inventive step vis-à-vis a discovery were unclear. The contrast between IPR regimes for the modern industrial sector and the lack of protection for traditional knowledge was seen by some countries as representing unequitable benefit sharing. Increased polarization between providers of genetic material and the sectors benefiting from IPR protection, particularly for agricultural genetic resources, was unfortunate. Such polarization could make it more difficult to agree on common strategies to conserve and sustainably manage biodiversity. Thus, the CTE should move towards a situation where different international agreements were implemented in mutually supportive ways. The TRIPS Agreement should be implemented in a manner which was consistent with the CBD, and *vice versa*. Also, the 1999 TRIPS review should adequately explore relevant links to MEAs.

51. The representative of Australia said that a major aspect of this Item was the relationship between the knowledge, innovations and practices of indigenous and local communities and the promotion of environmental objectives, particularly under the CBD. The starting point for analysing this issue was an understanding of how existing IP systems may be used to protect the knowledge, innovations and practices of indigenous and local communities, and through this provide incentives for biodiversity conservation and promote the fair and equitable sharing of benefits arising from the use of genetic resources. The TRIPS Agreement set out minimum standards for IPR protection and

left WTO Members at liberty to adapt and extend the IP system. It also allowed Members to develop supplementary forms of IP protection to meet the policy goals in CBD Article 8(j) in accordance with their own domestic policy settings. Work was necessary to improve the practical understanding of the potential of existing IP rights to increase the benefits that can accrue to indigenous and local communities. Thus, Australia welcomed the WIPO programme on IPRs, which was a practical initiative which Australia had supported, including through hosting its first fact-finding mission. This work would provide a basis for future discussions on the possible role of IPRs in relation to CBD objectives and the interests of indigenous and local communities. If international cooperation in this area were to lead to beneficial outcomes, work should proceed with a full understanding of the IP system and the principles embodied in TRIPS, and with the relevant IP expertise.

52. Better use and greater understanding of the possibilities of the existing IP system had the potential to achieve outcomes consistent with the aims of both the CBD and the TRIPS Agreement. International cooperation, at a practical level, should include a review of each of these possibilities. Australia outlined the following illustrative list of issues, noting that not all would be relevant for all countries: practicalities of licensing and contract law in relation to traditional knowledge and genetic resources owned by or under the custodianship of indigenous and local communities; use of trade mark law (including collective and certification marks), and geographic indications, to facilitate market recognition and fair trade in goods related to indigenous and local traditions; similar use of unfair competition and consumer protection law; use of the law of confidentiality and undisclosed information to protect indigenous and local knowledge; use of patent information systems to monitor and assess technological developments making use of traditional knowledge and genetic resources, and recourse to existing legal processes to resolve any concerns relating to patent applications or granted patents; collective administration of copyright, and exploration of the application of existing copyright principles to a wider range of beneficiaries and subject-matter; use of industrial design protection, utility models, petty patents, and similar forms of protection, where available, which may be applicable to relevant innovations and original designs drawing on traditional cultures or knowledge; and recognition of new plant varieties developed by indigenous and local communities.

53. This kind of practically-oriented work, exploring the benefits of the existing IP framework, can proceed immediately, at grassroots, national and international levels, and would help promote informed international dialogue. At the international level, the CTE should recognize the relevant work already being undertaken, such as in WIPO to identify new approaches to IP systems by new beneficiaries such as holders of indigenous knowledge and innovations, taking into account the interests of such groups which had hitherto had little or incomplete exposure to the IP system. Potential benefits for indigenous and local communities may include promoting understanding of the range of uses of existing IP systems by indigenous people and local communities (as well as any related small and medium enterprises), and investigation of the use of existing norms to protect a range of indigenous works. The options for practically providing for protection of indigenous knowledge and biodiversity could emerge from such work. For example, there was scope to train indigenous communities in licensing agreements to negotiate mutually agreeable terms for the use of their knowledge or genetic resources. Training could also be provided in patent principles to assist communities to identify their own patentable technologies and to consider the legal implications of patent applications derived from existing indigenous knowledge. A recent case on the medicinal uses of turmeric had demonstrated how established patent principles can be used to invalidate a patent claiming material already recognized as traditional knowledge and commonly used in India.

54. WIPO envisaged the creation of a traditional and indigenous knowledge database which may be used to encourage the recognition, protection and compensation of knowledge of farmers and traditional communities. This database would provide a practical mechanism to safeguard and document traditional knowledge, thus facilitating searches of the prior art base and easily demonstrating the extent to which claimed subject matter was in the public domain. It would facilitate procedures in relation to patents, the validity of which was called into question, such as in

the turmeric case. Geographical indications, and collective and certification trade marks, represented potential tools for the protection of regionally-based traditions. Australia was exploring the use of collective or certification trade marks. Once a more concrete sense of the possibilities of the IP system had been developed and applied, greater insights would be gained into how existing systems may be adapted, and what further steps were needed to deal with subject matter that was not readily dealt with by the existing system. One example was WIPO's work on new forms of protection for expressions of folklore.

55. The representative of India, responding to remarks on WT/CTE/W/82, said that with respect to specifically mandated technology required pursuant to an MEA, the market available for such technology would be manifold as compared to ordinary patents. This was logical. On the US comment that experience had shown technology transfer occurred in countries with strong patent regimes, India would like to have empirical evidence in this respect. An open investment regime, for example, could result in technology being transferred along with the right holder in the form of capital equity and investment. On the US comment that this was a hypothetical issue, India had presented a practical problem experienced by at least three countries with respect to at least one technology being phased-out under an MEA. Future MEAs could have similar obligations. To ensure the mutual supportiveness of environmental conservation and the WTO, such issues should be analysed. Japan's suggestion to examine empirical evidence was also a way forward.

56. Concerning the US comment on WT/CTE/W/85 that the CBD did not mention prior informed consent, India said that, as the CBD had an obligation to share benefits, this paper suggested that prior informed consent was the way in which to do so. Australia's proposal was also relevant in this regard. The idea was to ensure mutual compatibility between the CBD and the TRIPS Agreement. India reiterated that substantive changes had not been made to the TRIPS Agreement prior to the CBD's conclusion. India had doubts about the EC's comment that acknowledgement or compensation for biodiversity use could be achieved outside the IP system. Both the CBD and WIPO had started work to examine possible solutions in this area. Unless rights holders had the obligation to state the source of origin, India asked how indigenous communities would be aware of how their traditional knowledge was used, or be able to pursue benefit sharing. The CBD could forward to the WTO ideas on the compatibility of the TRIPS Agreement and the CBD. The CTE should also share proposals with the CBD.

57. The representative of Canada recalled that his delegation's intervention at the September 1997 meeting had focused on the CBD, as the MEA that dealt most extensively with the interface between IPRs and environmental protection. Canada had said that many of the possible IP issues related to the CBD's goals could be addressed through existing instruments and remedies under TRIPS, WIPO and domestic legislation. Canada had also noted the following issues: the complexity of indigenous knowledge issues; Canada's support for the CBD clearing-house mechanism to share national experiences; Canadian experiences with traditional knowledge in respect to forests; identification of issues related to agricultural biodiversity and trade liberalization; the importance of IPRs, and TBT and SPS considerations, in negotiating the Biosafety Protocol; and the need to enhance information exchange between the CBD Secretariat and the WTO. Canada welcomed recent developments in this area. WIPO had initiated a research programme to investigate the issue of indigenous knowledge and local knowledge, including for genetic plant resources.

58. The Conference of the Parties to the CBD, at its fourth meeting in May 1998, had decided to establish an open-ended *ad hoc* working group on Article 8(j), which dealt with traditional knowledge, innovations and practices. Australia and Colombia's comments merited further consideration. Canada had raised the potential conflict between some proposals in the Biosafety Protocol and WTO disciplines in the SPS Committee meeting of June 1998. This was a concrete example of where sound domestic policy coordination was required to avoid potential conflicts between the WTO and an MEA. The issue of "farmers' rights" had arisen in the FAO discussions in

June 1998 on the International Undertaking on Plant Genetic Resources, which could have implications for IPR application. Whilst Canada was willing to recognize the contribution of farmers and the need to protect, consistent with national legislation and international agreements, their ability to keep, use, exchange, share and market seeds and other plant materials, this was not a basis for recognition of an international form of farmers' rights.

59. The representative of Korea agreed that access to, and transfer of ESTs was essential for environmental protection and promoting sustainable development. The TRIPS Agreement should play a positive role in facilitating access and transfer, whilst protecting IPRs. Korea had taken note of the issues raised with respect to technology transfer being left to the discretion of the patent holder once substitute technology was protected by patents after the restriction on the original technology under an MEA. Korea supported Japan's suggestion to analyse concrete cases to enrich the CTE's understanding and focus the discussion. Korea was willing to make a contribution in this regard. To ensure consistency between the CBD and the TRIPS Agreement, it was necessary for the WTO and CBD Secretariats to exchange information and explore an appropriate mechanism to ensure consistency between these two agreements, whilst bearing in mind the review of Article 27 of the TRIPS Agreement. Korea welcomed the CBD decision to set up an ad hoc working group to explore the positive interface between the need for the protection of indigenous and traditional knowledge and the TRIPS Agreement. CTE work on this issue was necessary in view of CBD developments.

60. The representative of Malaysia, on behalf of ASEAN, reiterated ASEAN's commitment to the harmonious implementation of the CBD and the TRIPS Agreement. At the MEA Information Session, the CBD had noted the desire of CBD Parties to explore with the CTE several aspects related to the relationship between these two agreements, for example access to genetic resources. ASEAN recalled its statement at the June 1995 meeting of the CTE, setting out, *inter alia*, that, whilst the WTO would create greater disciplines and a more conducive environment in the conduct and development of trade, it also had a responsibility to contribute to the promotion of sustainable development. ASEAN felt the TRIPS Agreement contained the necessary prerequisites for the development and transfer of technology while addressing the environment; implementation of the TRIPS Agreement was paramount for sustainable development. Notwithstanding this, and in preparation for the 1999 review of the TRIPS Agreement, the CTE could examine: (i) how to more precisely interpret the scientific and practical definitions of terms such as "plants", "animals", "mico-organisms", "biological processes", "plant varieties" and an "effective *sui generis* system" in the context of TRIPS Article 27.3(b); (ii) the implementation of TRIPS Article 66.2, which called upon developed country Members to provide incentives to enterprises and institutions in their territories to promote technology transfer to LDCs; (iii) an assessment as to whether the economic incentives for biodiversity conservation and sustainable use allowed for in the TRIPS Agreement were sufficient; and (iv) the compatibility of CBD and WTO provisions.

61. The representative of the United States said that Members' contributions of case studies on the TRIPS Agreement and technology transfer should, consistent with the 1996 Report of the CTE, also take into account other factors impacting on technology transfer, such as investment climate, regulatory regimes, etc. It did not make sense to raise examples which only focused on one aspect of a multidimensional issue. The US would examine ASEAN's suggestions for further work; some of the issues raised were so technical that the TRIPS Council might be better placed to address them. He said that not only had significant, substantive changes been made to the TRIPS Agreement following the Dunkel Draft, some had been at India's request, i.e. on whether dispute settlement would allow the possibility of non-violation complaints which bore directly on the balance of obligations. The US supported the suggestion to forward CTE papers to the CBD in addition to the minutes of the meetings at which these papers had been discussed, to permit a full picture of the discussions.

62. The representative of India responded that the non-violation amendment to the TRIPS Agreement was a horizontal issue which reflected that the implications of the commitments

undertaken had not been fully known. Thus, it had been desirable to keep non-violation complaints out of the discussion. India's view was that there had not been any amendment to the TRIPS Agreement after the Dunkel Draft on the substantive issues of protection. Whenever the CTE forwarded information to MEAs which were discussing similar issues, this information should reflect the substance of the discussions, as well as include relevant papers.

63. The Chairman said he would explore with the Secretariat the current practice of exchanging information with the CBD in order to address the requests for enhanced cooperation between the CBD and the WTO on issues of mutual relevance.

64. The observer of the World Intellectual Property Organization said that the objective of WIPO was to promote IP protection throughout the world. As the specialized UN agency responsible for IP protection, WIPO was equipped to provide technical information on trade-related and environmental aspects of IPRs. In 1998-99, WIPO was taking an exploratory approach to emerging IP issues related to trade and environment, specifically in its work programme on "Biological Diversity and Biotechnology" to explore the role of IP in the conservation, use and dissemination of biodiversity and the use of IPRs in EST transfer under MEAs. Debates on IP aspects of biotechnological inventions provided an example of this increasing connection. Although, WIPO had dealt with IPRs in relation to biotechnological inventions as an issue primarily related to technology transfer, recent debates indicated an increasing interest in the possible linkages between IP aspects of biotechnology and the conservation and use of biodiversity and the sharing of benefits arising from such use. WIPO's research will include: the convening of a Working Group to study IP aspects of biotechnology and the implementation of the CBD; two regional seminars on the patenting of biotechnology; participation in relevant international bodies, including the CBD and the Biosafety Protocol; on-site documentation projects of traditional knowledge relevant to the preservation, conservation and sustainable use of biodiversity, in cooperation with UNEP; and a study on the impact of IP on technology transfer under MEAs.

65. The IP system was designed to reward innovation and encourage technology transfer. Strong IP protection acted as an incentive for investment in the research and development of ESTs and increased technology transfer. IP protection gave confidence to technology owners to invest directly in other countries through wholly owned subsidiaries, joint ventures and licensing agreements with other companies. At times, the existence of IPRs might increase prices and restrict competition. The balance between these impacts on technology transfer under MEAs will differ from industry to industry and from country to country.. WIPO's study on the impact of IPRs on MEAs will look at technology transfer under 9 relevant MEAs, covering a range of technologies and different regions and countries. The study's conclusions and solutions will aim to ensure that the IP system continued to support the objectives of sustainable development. WIPO invited contributions from governments, industry representatives, NGOs and MEA Secretariats to share their experiences in this field.

Other Items

Item 3(b): The relationship between the provisions of the multilateral trading system and requirements for environmental purposes relating to products, including standards and technical regulations, packaging, labelling and recycling

66. The representative of Canada said that during the Trade Policy Review (TPR) of India in April 1998, Canada had asked India questions on its Eco-Mark Type I eco-labelling programme, mentioned in paragraph 82 of the Secretariat Report. India had not, understandably, provided answers to the questions at the time, given the need to consult relevant officials in capital. Canada had also made reference to the case study of the Eco-Mark in the ESCAP publication, *Trade Effects of Eco-Labelling*, described in WT/CTE/W/79, and discussed at the March 1998 meeting of the CTE. The CTE had benefitted from the national experiences of Canada's forestry national experience paper

(WT/CTE/W/81-G/TBT/W/61), Colombia's paper on cut flowers (WT/CTE/W/76-G/TBT/W/60), and Brazil's statements on leather and forest product labels. In 1998, developing country Members had outlined their experiences in the design, development and implementation of eco-labels, in contrast to 1996, when contributions had been made largely by developed countries. India's responses to Canada's questions would be helpful in further appreciating developing country concerns. In particular, Canada welcomed India's comments on the statement in the Secretariat's TPR Report that "according to the authorities, it (the Eco-Mark) has yet to be successful". Canada also would appreciate comments on the use of process and production criteria in the development of specific product criteria, and an outline of the criteria development and approval process used by India's Eco-Mark. Canada encouraged further experience sharing on eco-labelling by other developed and developing country Members to enhance an understanding of the various approaches used.

67. The representative of India said it was correct that the Indian Eco Mark had not been successful, despite having been in existence for eight years. The informed consumer choice which was the basis for such voluntary eco-labels had not led consumers to eco-labelled products. One product thus far had obtained an Eco Mark, but even that product was no longer selling with the eco-label as there was a perception amongst the poorer, predominant section of the Indian society that any such label increased the product's price. India would provide details on criteria development and criteria in the approval process. This information could also be obtained from the Bureau of Indian Standards (BIS), which was a party to the Eco-Mark's development. The BIS was India's enquiry point under the TBT Agreement, so questions could also be addressed to them in this manner.

68. The representative of Canada thanked India for its response. Whilst Canada understood that responses could be obtained through the BIS, it would be helpful in the context of the CTE or in the follow-up to the TPR of India that those questions be responded to in written form.

69. The representative of India said that his delegation would respond to Canada's questions at the next meeting of the CTE which addressed Item 3(b).

70. The representative of Malaysia, on behalf of ASEAN, recalled ASEAN's statement at the March 1998 meeting on the Dutch initiative to label all forestry products. ASEAN expressed its concern that this was not trade-neutral and asked the EC to up-date the CTE in this regard.

71. The representative of Canada said his delegation shared ASEAN's concerns and would also appreciate an up-date by the EC on the Dutch initiative. Canada was considering raising this issue at the TBT Committee meeting in September.

72. The representative of the European Communities said that the Netherlands had transmitted the text of the draft law on labelling to the Commission, which would proceed to check its compatibility with internal standards and give an opinion in this regard as soon as possible. The EC brought Members' attention to the information note on the EC Web Site on eco-labelling, which had been revised, extended, and up-dated at a new address: http://europa.eu.int/ecolabel.

Item 6: The effect of environmental measures on market access, especially in relation to developing countries, in particular to the least developed among them, and environmental benefits of removing trade restrictions and distortions

73. The Chairman noted some recent developments of interest under Item 6. The Council on Services had met on 23 July 1998 to address, *inter alia*, the environmental services sector as part of the information exchange on services sectors. The background note on environmental services, prepared by the Services Division for that meeting, S/C/W/46, was useful in the context of the CTE's discussions, as it built on the sectoral analysis of the environmental benefits of liberalization of environmental services in WT/CTE/W/67/Add.1. On 20-22 July 1998, UNCTAD had held an Expert

Meeting on Strengthening Capacities in Developing Countries to Develop their Environmental Services Sector; copies of the document prepared for that meeting, were available from the UNCTAD Secretariat. The UNCTAD Secretariat had made available copies of the agreed conclusions of that meeting and would circulate the Chairman's summary for the information of CTE Members as WT/CTE/W/96. Lastly, the OECD had recently published a study, *Improving the Environment Through Reducing Subsidies*, which collected and synthesized available OECD work on support measures and their environmental effects.

74. The representative of the European Communities said his delegation's comments at the March 1998 meeting on the Secretariat's document on the environmental benefits of removing trade restrictions and distortions (WT/CTE/W/67) had been circulated as unrestricted in WT/CTE/W/83.

75. The representative of Brazil said her delegation had circulated, in WT/CTE/W/93, a set of principles on environmental protection and sustainable development which Brazilian industry was to observe in its activities. The importance of these principles stemmed from the fact that they were a voluntary initiative of the Brazilian National Confederation of Industry illustrating Brazilian industry's level of commitment to environmental and social matters.

Agriculture

76. The representative of Norway recalled that at the March 1998 meeting, countries which had suggested that trade liberalization could lead to adverse environmental effects were invited to contribute their national experience. As Norway was working on a paper, focusing on the agricultural sector, to be presented at the October meeting, he gave some preliminary reflections on these issues. Allocative efficiency and welfare maximization should be core issues in economic policy and provide a basis for the multilateral trading system. Trade liberalization was not an end in itself, but could be a means to improve efficiency and increase welfare. However, market-based mechanisms could not lead to optimal resource allocation if prices did not fully reflect a product's costs and benefits. Welfare could not be maximized if society's preferences for public goods were not fully taken into account. In the environmental area, such public goods included the agricultural landscape, biodiversity and viability of rural areas.

77. External costs and benefits of agricultural production were taken into account through the following principles. The polluter pays principle (PPP) related to negative production externalities and was widely accepted; it stated that the costs of a negative externality (such as pollution) should be born by its originator, and eventually reflected in a product's price. The provider gets principle (PGP) dealt with positive production externalities, according to which providers of goods or services demanded by a society should be paid. The PGP was, thus, closely related to the provisions of public goods, for which a functioning did not exist. Through the application of these two principles, environmental benefits contributed by agriculture and demanded by the society could be recognized and developed, and the environmentally harmful impact of this sector could be reduced to a minimum. Agricultural trade liberalization affected the application of these principles in the following ways. The application of the PPP increased the costs of agriculture production, compared to countries that failed to apply this principle. Compensation for this cost disadvantage, thus, should be allowed. The PGP implied public payment or compensation to providers of a public environmental good. A degree of support coupled to agricultural production was the most efficient way of satisfying the demand for such public goods, to the extent that they were joint products of agricultural production. These issues were discussed in detail in the paper on non-trade concerns presented by Norway to the Committee on Agriculture. In Norway's view, the WTO must allow countries to apply the PPP and the PGP to protect the environment and maximize welfare. Trade liberalization would likely have adverse environmental effects if it formally, or in effect restricted the application of these policy principles.

78. Norway commented on the view of some Members that agricultural trade liberalization would generally be environmentally beneficial based on the hypothesis that environmental problems were less pronounced in countries with low agricultural support levels, compared to countries with high levels of support. In this respect, Norway had compared its agricultural sectors with selected low-support countries, and the OECD average. Based on OECD and FAO data, Norway had a consumption of pesticides per hectare of arable land that was less than half of the OECD average and one fifth of selected low-support countries. Norway's consumption of fertilizer was below the OECD average. The livestock density, which may be a useful proxy indicator for water pollution, appeared to be far higher in selected low-support countries compared to Norway. Although these figures may have been subjected to some methodological shortcomings, they did not support the hypothesis that a potential shift in production from high-support countries, like Norway, to low-support countries, would result in an overall reduction in environmental degradation. Such a shift could also have a negative bearing on biodiversity both in countries where agriculture was contracting and where it was expanding. The extent of agricultural environmental problems varied according to natural conditions, farming methods, and national legislation and policy measures. Norway believed that there was not a clear relationship between environmental degradation and the level of support in different countries.

79. The representative of Argentina thanked Norway for its statement and for its paper circulated in the Committee on Agriculture. Argentina had also circulated a paper in the Committee on Agriculture, which would also be circulated in the CTE as WT/CTE/W/97. Argentina's paper referred to market and policy failures which did not permit prices to reflect the full cost of production. If prices were distorted through policies, such as subsidies, which had an effect on production and exports, international prices were so distorted that they could not even reflect the private marginal cost of production. Thus, it was not possible to internalize the environmental costs of production with such distorted prices in place. Argentina was not arguing that free trade was a guarantee of environmental protection, but that if prices did not reflect the private cost of production due to distorted policies, such as subsidies, then it was not possible to move towards reflecting the full production costs. This entailed costs for developing countries, which could not off-set domestic policies which distorted prices, such as subsidies, that were implemented by developed countries. Removing subsidies was necessary as a first step to get the prices right, i.e. to reflect the private cost of production and then to internalize the full cost of production. This argument had been repeated since Principle 16 of the *Rio Declaration* had been agreed in 1992. Basically, it was not possible to build on distorted prices.

80. The representative of Japan appreciated the EC's comments in WT/CTE/W/83. Japan would also comment at a later stage. Japan shared the EC's view that trade liberalization may need to be accompanied by environmental and resource management policies. Trade liberalization should not be undertaken without questioning whether environmental policies had been properly introduced. WT/CTE/W/67 would have been more comprehensive if it had addressed the positive environmental externalities associated with agriculture. More attention should be given to this aspect and Japan intended to make a contribution at the next meeting in this regard.

Environmental services

81. The representative of the United States said UNCTAD's Expert Meeting on Environmental Services on 20-22 July had recognized the positive contribution that further trade liberalization in environmental services could make to environmental protection. It had also recognized that further trade liberalization could contribute to improving living conditions, particularly for the poorest members of the population. This meeting had encouraged the WTO to pursue further liberalization in environmental services in the forthcoming GATS negotiations in recognition of the fact that liberalization in this sector could provide "win-win" situations. Governments were invited to take steps, including through IPR protection, to improve their capacity to absorb ESTs and adapt them to local conditions. The US felt that the UNCTAD meeting had been useful and commended its documents and conclusions for Members' consideration.

Forestry

82. The representative of Canada said that the presentations at the MEA Information Session by the International Tropical Timber Organization (ITTO) and the Intergovernmental Forum on Forests (IFF) had been helpful in demonstrating direct linkages between international forestry processes and WTO work. Certification, standards and labelling was an area where both organizations would welcome input from the relevant WTO bodies. The Canadian forestry national experience paper (WT/CTE/W/81-G/TBT/W/61) made extensive reference to the Intergovernmental Panel on Forests in this regard. Canada's paper would also be circulated as a contribution to the IFF meeting in August in Geneva, to contribute to improved understanding of the issues and policy considerations involved in both the trade and forestry forums. Canada shared the view expressed by the ITTO and IFF that standards, certification and labelling schemes must not discriminate between tropical and temperate wood and wood products; this was an issue where developed and developing country producers had a common interest in contributing to an informed and balanced discussion. As there was a potential for trade discrimination, there was a clear role for WTO Members to clarify or strengthen existing disciplines, so that standards, certification and labelling approaches furthered sustainable forest management objectives while being trade-neutral. There was also a need for governments, in both the trade and forest forums, to provide policy guidance on these issues.

83. As Canada's paper demonstrated, an experience similar to that of Colombia with cut flowers, the issues involved were broader than earlier discussion of Type I single mark eco-labelling. CTE discussions must be similarly broadened, and Canada felt it would be helpful to invite the IFF to brief the CTE, in both oral and written form, of their discussions on these issues at the next meeting of the CTE. Canada noted with interest the EC's reference, at the MEA Information Session, to the fact that access to its GSP scheme for forest products was conditional on ITTO adherence. Canada welcomed clarification on whether this conditionality was with respect to access to the GSP itself, or was GSP plus. Canada welcomed further discussion of these issues in either the CTE or the TBT Committee.

84. The representative of Malaysia, on behalf of ASEAN, said his delegation would also appreciate clarification from the EC regarding its GSP scheme for forest products.

85. The representative of the European Communities said the GSP scheme of the EC did not contain an element of conditionality. There was an element of additionality, whereby products from sustainably managed forests could have additional preferences under the GSP scheme.

86. It was agreed to invite the Intergovernmental Forum on Forests to the 26-28 October meeting of the CTE to brief Members on discussions in the IFF.

Item 9: The work programme envisaged in the Decision on Trade in Services and the Environment

87. The representative of Japan made a preliminary statement under this Item. He welcomed the document which had been prepared for the Council for Trade in Services regarding environmental services (S/C/46) and asked Members to review it in the context of CTE work on the relationship between services and the environment. This was a sector where liberalization would lead to enhanced environmental protection and quality of life. As Japan had said in the Council for Trade in Services, further liberalization of environmental services should be promoted. Analysis could be undertaken on several issues, such as whether foreign access providers in this sector faced barriers to trade in services, and with respect to government procurement. The CTE could also explore specific services sectors, such as transport and financial services under Item 9.

88. The Chairman said that, in light of the discussion, CTE Members may wish to consult S/C/46 and suggested that copies be made available at the October meeting of the CTE.

Other Matters

89. The representative of the European Communities informed the CTE that his delegation had submitted a communication on a high level meeting on trade and environment to the WTO General Council at its meeting on 15-16 July 1998. This communication (WT/L/273), represented the follow-up to the EC's proposal at the 19-20 March 1998 meeting of the CTE, at which the EC had suggested that strengthening the dialogue between top level trade and environment policymakers would foster the process by which the CTE discussions became relevant to broader WTO decision-making. Since then, the EC's idea had gained increasing support. The EC's communication was drafted partly in response to calls for it to set out its ideas in greater details. His delegation hoped that this communication would be discussed by the General Council after the summer recess.

90. The CTE expressed its appreciation for the contributions of Mr. Andrew Griffith (Canada) and Mr. Gary Sampson (WTO Secretariat) to the work on trade and environment.

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